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IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

Term Number 9

THE STATE OF IOWA, PLAINTIFF IN ERROR,

vs.

EDWIN O. ROOD, CHARLES W. ROOD, GEORGE A. WALLACE, EMILY J. WALLACE, GEORGE S. WALLACE, AND MRS. GEORGE S. WALLACE,

DEFENDANTS IN ERROR.

IN ERROR TO THE SUPREME COURT OF IOWA.

BRIEF AND ARGUMENT FOR DEFENDANTS IN ERROR.

R. M. WRIGHT, ATTORNEY FOR DEFENDANTS IN ERROR.

(17738)

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ADDITIONAL STATEMENT OF THE CASE.

In the year 1879, the County of Humboldt, Iowa, in consideration of the building of the Fort Dodge and Fort Ridgely Railway through the county, made a contract with said railroad company (trans., 5–8) whereby it agreed to convey all its swamp lands to said railroad company, both those that were then patented to the county and those which should thereafter be patented to it. This contract was ratified by the voters of the county in the manner provided by law and the railroad was built pursuant to its terms and conditions.

In the year 1884 the county, in pursuance of said contract, in terms conveyed to said railroad company as swamp land (trans.

81) the unsurveyed portions of sections 21, 22, 27 and 28, of township ninety-two (92) north, of range twenty-seven (27) west, of the 5th P. M., Iowa, being the land in controversy. On December 15, 1884, the said railroad company (trans. 83) deeded the said lands to one A. McBane, who shortly thereafter deeded them to George R. Pearsons, the grantor of the other co-defendants in error in this case. Immediately on these lands being deeded by the railroad company George R. Pearsons, supposing himself to be the owner thereof and regarding the same as swamp lands, commenced to ditch and drain the same, and continued so to do up till the year 1892 (trans. 30) and he spent in this work the sum of $2,860.00.

In the year 1895 he requested the governor of the state of Iowa to procure a patent from the government of the United States to the state of Iowa of said lands as swamp lands, and he submitted to the governor his proofs. *Section 2 of the Swamp Land Act of September 28, 1850* (United States Statutes at large 9 vol. 520) provides "that it shall be the duty of the Secretary "of the Interior so soon as it may be practicable after the passage "of this act to make out accurate lists and plats of the said lands "described as aforesaid, and transmit the same to the governor of "the state * * * * and at the request of the said governor "cause patents to be issued to the state therefor, and on that pat-"ent the fee simple to said lands shall vest in the state subject to "the disposition of the legislature thereof." *Section 3 of Chapter 138 of the laws of the Fifth General Assembly of Iowa*, passed January 25, 1855, provides as follows: "That the governor is "hereby authorized to adopt such means as to him may seem ex-"pedient to provide for the selection of the swamp lands of this "state and to secure to the state the title to the same."

Under this provision of law, the governor submitted to the secretary of the interior the proofs furnished him and requested a patent, which was accordingly issued to the state and thereafter the said lands were patented by the state as swamp lands to the county of Humboldt.

QUESTIONS IN THE CASE.

In this case there are two general questions to be considered:

First. Has this court jurisdiction to hear and determine the case?

Second. If it has jurisdiction, what ought its decision to be?

The first of the above questions has been argued on the motion to dismiss the writ of error and will be noticed again only by way of argument in reply to plaintiff in error. The second question goes to the merits and will be argued at some length.

ARGUMENT AS TO THE JURISDICTION OF THIS COURT.

The jurisdiction of this court to consider this case involves the following questions:

First. Is there a federal question involved, and (1) has the decision of the federal question, if one is involved, been against the validity of a treaty or statute of, or an authority exercised under, the United States; or (2) has the decision been in favor of the validity of a statute of, or an authority exercised under, the state of Iowa, which statute or authority is repugnant to the constitution, treaties, or laws of the United States; or (3) has the decision been against any title, right, privilege or immunity specially set up or claimed by plaintiff in error under the constitution, or any treaty or statute of, or commission held or authority exercised under, the United States? If the answer to these questions is in the negative, it ends the case.

Second. Could the case have been decided by the supreme court of Iowa without regard to the federal question? If the answer to this question is in the affirmaative, it likewise ends the case.

I.

Article 3 of the Treaty with France, whereby the territory now embraced in the state of Iowa, was ceded to the United States, provides, "That the inhabitants of the ceded territory shall

"be incorporated into the Union of the United States, and ad-"mitted as soon as possible, according to the principles of the "federal constitution, to the enjoyment of all the rights, advant-"ages and immunities of the United States." This treaty did not, and does not, give to the state of Iowa the right to the lake beds and river bottoms located within its territory. Whatever rights it has to them are given by virtue of its statehood—existing just as they would exist if Iowa had been first organized as an independent nation and afterwards admitted into the Union. On coming into the Union, in so far as its rights to the beds of lakes and rivers were concerned, Iowa at once took on the *status* of the thirteen original colonies as that *status* existed prior to the adoption of the constitution and prior to the formation of the Union. It took the *status* which the British Province of Ontario would take if it now voluntarily came into the Union as a state. If the state of Massachusetts had within its borders any unoccupied lands and it were to transfer them to the United States to be treated as a part of the public domain, and the general government were to order a new survey, and in such survey there should be included some ponds that had theretofore been meandered, and the general government should attempt to sell them to private parties, and the supreme court of Massachusetts, on a claim to them being made by the state, should decide against the state, could it be said that there was a federal question involved which had been decided against the validity of a treaty or statute of, or against an authority exercised under, the United States, or against any title, right, privileges or immunity specially set up or claimed by the state under the constitution or any treaty or statute of, or commission held or authority exercised under, the United States? On the contrary, the right and title claimed would be entirely independent of the constitution or of any treaty or statute of, or commission held or authority exercised under, the United States, and the decision complained of, instead of being against, would be in favor of the validity of the authority exercised under the United States.

Our contention is, that in this case the state of Iowa is in exactly the same situation as the state of Massachusetts would be in in the case supposed.

The first of the foregoing questions relating to the jurisdiction of this court really contains three questions which I have numbered (1), (2), and (3), respectively. I shall take these up in their order.

Question (1) Has the decision of the federal question, if one is involved, been against the validity of a treaty or statute of, or authority exercised under, the United States? Under this division (1) of section 709 of the Revised Statutes, if a federal question is involved in the case at bar, it has not been decided against the plaintiff in error.

First as to the treaty and statute under which plaintiff in error claims ownership of the land in question and against which it claims the decision of the court below was directed.

(a) The treaty through which the plaintiff in error claims the ownership of the lake bed in question, is that of April 30, 1803, between France and the United States, and the statute under which its alleged right is claimed, is the statute admitting Iowa into the Union as a state. Now, we do not question the validity of this treaty nor the validity of this statute; we simply deny one of the consequences which it is claimed flow from them, *i. e.*, the right of the plaintiff in error to the land in question. This division which I have marked (1) of section 709 of the Revised Statutes is to be carefully distinguished from the division which I have marked (3), and which in this argument I shall take up later. Under this division (1) the decision of a lower court of which this court will take jurisdiction, must have been against the validity of the treaty, statute or authority exercised. Under the division which I have marked (3) the decision must have been against the right, title, privilege or immunity claimed to depend upon the treaty, statute or authority exercised. This court has said: "The distinction is palpable between the de-

"nial of the validity of the authority and a denial of the title, "right, privilege or immunity claimed under it."

Baltimore & Potomac Railroad Company, 130 U. S. 223.

"Whenever the power to enact a statute as it is by its terms, "or is made to read by construction, is fairly open to denial and "denied, the validity of such statute is drawn in question, but "not otherwise."

Baltimore & Potomac Railroad Company, 130 U. S. 224.

"The validity of the authority must have been drawn in "question directly and not incidentally. The validity of a statute "is not drawn in question every time rights claimed under such "statute are controverted, nor is the validity of an authority "every time an act done by such authority is disputed. The "validity of a statute or the validity of an authority is drawn in "question when the existence or constitutionality or legality of "such statute or authority is denied, and the denial forms the "subject of inquiry."

United States vs. Lynch, 137 U. S., 285.

"The validity of a statute is not drawn in question every "time rights claimed under such statute are controverted, nor is "the validity of an authority every time an act done by such "authority is disputed."

Cook County vs. Calumet & Chicago Land Company, 138 U. S., 653.

Under the above decisions it would seem clear that this case has nothing to do with the validity of any treaty or statute of the United States.

(b) *Second as to the validity of the authority exercised under the United States, under the exercise of which authority plaintiff in error claims ownership of the land.*

If under the division I have marked (1) of the judiciary act, the decision of the state court has given jurisdiction to this court, it is because said decision has been inimical to the validity *of an authority* exercised under the United States.

The second assignment of error reads thus: *The court erred in holding that the survey of the public lands of the United States, the approval of such survey by the Land Commissioner of the United States and the Secretary of the Interior, and the sale of the land under such survey did not fix the status of the meandered lakes and streams, except in cases of palpable mistake or fraud, beyond recall by any subsequent act of the land department.*

Under this assignment of error it is claimed that the original survey of the public lands, the approval of such survey, the sale under such survey of the lands surrounding the lake, were all done under the authority of the United States, and that the decision of the state court was against the validity of such authority. We admit that these acts were done under the authority of the United States, but we deny that the decision of the state court was against *the validity of the authority* under which they were done.

In *Millinger vs. Hortupee, 6 Wallace, 258, 261 and 262*, it is held that the word "authority" stands upon the same footing with "treaty" or "statute." What has been said, therefore, with respect to the validity of treaties and statutes will apply to the validity of "authority." The defendants in error admit the authority under which the United States surveyed the public lands surrounding this lake; they admit the right of the land commissioner and the secretary of the interior to approve the survey, though in this case no formal approval was ever made. They admit the right of the United States to make sale of the lands surrounding the lake in question; they admit the validity of the authority under which all these acts were done, but they aver that under this *valid* authority an erroneous survey was made with respect to the lands in question just as they might admit that a court having jurisdiction and full power and valid authority might make an erroneous decision; but they claim that in this case the erroneous decision made under valid authority has been set aside by competent authority.

Question (2) Has the decision been in favor of the validity

of a statute of, or an authority exercised under, the state of Iowa, which statute or authority is repugnant to the constitution, treaties or laws of the United States? This is not claimed by plaintiff in error and nothing, therefore, need be said in respect to it.

Question (3) Has the decision been against any title, right, privilege or immunity specially set up or claimed by plaintiff in error under the constitution, or any treaty or statute of, or commission held or authority exercised under, the United States? Under this division we say that no federal question whatever is involved.

The claim of title made by plaintiff in error in the second paragraph of its petition of intervention (trans. 10) reads as follows: "That the state of Iowa was duly admitted into the Union "and became a sovereign state in the year 1846, *and, as such sov-* "*ereign state, became and was the owner* of all the lakes within its "borders, subject to the right of the public to use the same and "for the use of the public, *and the title to the soil under said lake* "was and is in the said state." That this kind of ownership is the kind claimed by plaintiff in error is shown by the first assignment of error (trans. 93) wherein it is said "the court erred "in not holding that the lake beds of all meandered lakes and "streams in the state of Iowa belongs to said state in trust for "the public *by virtue of its sovereignty* and that the right *does not* "*depend upon any act of* congress or grant *from the United States*"

Obviously, under such a claim of title it would make no difference whether the territory of Iowa had come to the United States by treaty, by right of discovery, by conquest, or by simple occupation, the territory being vacant when first occupied, the title of the state when it became a state would be not by *virtue* of the manner in which the territory was acquired, but *by virtue of its sovereignty.* Error is predicated by plaintiff in error on the fact that the court did not hold that the claimed title of plaintiff did not arise from, or was not dependent on, any statute or act of congress. If it did depend on any act of congress it

must have been the act of congress that admitted Iowa into the Union.

In the case of *Pollard et. al., Lessee, vs. Hagen et. al., 3 Howard, 210*, it was contended that by the laws and usages of Spain the king had the right to grant the soil under the navigable waters to a subject, and that such lands were granted to the United States by the treaty with Spain, and the United States became the municipal owner of such lands and could in turn grant the same away to private parties. But in said case this court used this language: "Although there was no direct refer-"ence to any particular treaty, we presume the treaty of the 22d "of February, 1819, signed at Washington, was the one relied on "and shall so consider the argument. It was insisted that the "United States had, under the treaty, succeeded to all the rights "and powers of the king of Spain; and as by the laws and usages "of Spain the king had the right to grant to a subject the soil "under navigable waters, that, therefore, the United States had "the right to grant the land in controversy and thereby the "plaintiffs acquired the complete title.

"If it were true that the United States acquired the whole "of Alabama from Spain, no such consequences would result as "those contended for. It cannot be admitted that the king of "Spain could, by treaty or otherwise, impart to the United States "any of his royal prerogatives, and *much less can it be admitted* "that they have the capacity to receive, or *power to exercise, them.* "Every nation acquiring *territory by treaty or otherwise must hold* "*it subject to the constitution and laws of its own government, and* "*not according to the government ceding it.* (*Vat.* Law of Nations, "bk. 1, ch. 19. sec. 210, 244, 245, and bk. 2, ch. 7, sec. 80.)" The United States having received no such municipal ownership, could confer none.

The title claimed does not come from the constitution of the United States, for as is aptly said in the said case of *Pollard et. al., Lessee, vs. Hagen et. al., 3 Howard, 212,* "If an express "stipulation had been inserted in the agreement granting munici-

"pal right or sovereignty and eminent domain to the United "States, such stipulation would have been void and inoperative, "because the United States have no *constitutional capacity* to ex- "ercise municipal jurisdiction, sovereignty or eminent domain "within the limits of a state or elsewhere, except in cases in "which it is expressly granted."

The claimed title did not come from the treaty with France, for the title would be the same if there had been no treaty, but the territory of Iowa, being vacant, had simply been taken possession of and occupied by the United States.

The title does not come from any commission held or authority exercised under the United States, for such authority or commission could not confer title, and to say that it came from them would be to deny the claim of plaintiff in error that the lands belonged to the state by virtue of its sovereignty. The claimed title arose, not from any of these sources, but from the state's own sovereignty just as the ownership of the large ponds in Massachusetts came, not from an act of congress or from the United States, but from the state's inherent sovereignty. Under this division (3) of the judiciary act there clearly in this case was no federal question whatever to be decided in favor of or against the plaintiff in error.

II.

Could the case have been decided by the supreme court of Iowa without regard to the federal question?

In the case of *Hardin vs. Jordan, 140 U. S., 371*, this court did not hold that the ownership of meandered, non-navigable lakes was in the state in which they were situated; it simply held that the law of the state where they were situated as declared by its supreme court was controlling. That the states do not necessarily own the beds of meandered non-navigable lakes abundantly appears from the decisions. The supreme courts of Minnesota and Michigan and perhaps of other states, have declared that such ownership is in the riparian owners and the ownership of each of such owners extends to the middle of the lake.

Butler vs. Ry. Company, 85 Mich., 246; Lamprey vs. Metcalf et. al., 52 Minn., 181.

The supreme court of Iowa has never decided, so far as I can find, that the title to the bed of a non-navigable lake is in the state. The case of *Brown vs. Cunningham, 87 Iowa, 572,* was brought to recover on an injunction bond; the defendant was the riparian owner of land bounded by the meander lines of the Wapsepinecon river, a non-navigable stream. The plaintiff was cutting and removing ice from the river adjacent to the defendant's land, and the defendant procured an injunction to issue, restraining the plaintiff from removing ice, claiming that he was the owner of the river to the center of the stream; the plaintiff claimed that the defendant's title extended only to high-water line and brought suit on the bond for damages. The supreme court of Iowa said, "The river while not navigable was meander-"ed in the government survey. The bed of the stream—the "land—*never passed out of the proprietorship of the United States "government,* and the riparian owners had no right or interest "therein, and had no exclusive rights to the ice found upon the "stream." The joint resolution which is numbered 4 and is contained on page 213 of the laws of the Eighteenth General Assembly of Iowa, is in these words: "Be it resolved by the Gen-"eral Assembly of the state of Iowa, that our senators in con-"gress be instructed, and our representatives be requested, to "use their best endeavors to secure the relinquishment by the "United States to the state of Iowa of the title to all meandered "lakes within the limits of the state, the state to take care that "such lakes be preserved and in no event to part with the title "thereto." "*Approved February 27, 1880.*"

The state of Iowa originally conveyed its swamp lands to the counties for certain specific purposes—certain improvements that they were to make. These anticipated improvements were the consideration for the conveyance of the swamp lands by the state to the counties. Humboldt county to obtain an improvement, *i. e.*, the construe-

tion of the Fort Dodge & Fort Ridgely Railroad, made a contract with said company, agreeing to convey to it, not only all the swamp lands that had been patented to the county, but also all swamp lands that might thereafter be patented to it. Humboldt county and the railway company believed that the lands in controversy in this suit were swamp lands and that Humboldt county owned the same. On the strength of this contract and the belief that the railroad company would get the land in question, the improvement was made; the state got the same consideration for the lands in controversy that it would have received had the lands been actually swamp lands. Believing that they were swamp lands the defendants in error expended thousands of dollars in draining and improving the same. They thereafter made application to the governor to ask for a patent of these lands from the United States to the state as swamp lands. On this application being made it was open to the governor to say, "The "laws clothe me with the power to select swamp lands and to "secure patents to the same, but this land is not swamp land; I "have no power or authority in the premises, and I will not furn-"ish evidence to the land department tending to show that the "land is swamp land and will not request a patent." The governor did not do this. Like the legislature of Iowa, when passing the joint resolution, and like the supreme court of Iowa, as shown in the case of *Brown vs. Cunningham*, he did not regard the land as belonging to the state by reason of its sovereignty. When the application for a patent was made there was no one who appears to have entertained any idea that the land belonged to the state by reason of its sovereignty. The supreme court of the state, as shown by its decision, did not; the legislature of the state, as shown by its resolution, did not; the governor of the state, as shown by his act in asking for a patent, did not; and the county of Humboldt and the defendants in error did not. Is it now open to the state after encouraging the defendants in error to go on and expend their money and complete their title now to claim under a title which by its prior conduct it seems never to have recognized, or will it be estopped?

In the 4th defense of the defendants in error to the petition of intervention they pleaded estoppel against the state (trans. 13;) that this can be pleaded against the state would seem to be shown by the following authorities:

When a state comes into a court of equity to assert a claim, it is subject, and must be subject, to the same rules of procedure and principles of jurisprudence as obtain in suits between private individuals. *United States vs. Arredondo, 6 Peters, 691; United States vs. Flint, 4 Sawy., 68; United States vs. Tichenor, 12 Fed. Rep, 449.*

The case of *Chope vs. Detroit Road, 37 Mich., 195,* was a case where the state had given the right to the defendant to erect toll gates outside the city of Detroit. After the growth of the city so as to include these toll gates within its limits, it was sought by the state to enjoin the defendant from continuing a nuisance, and it was held that the state was estopped so to do.

"Where it is the duty of certain designated officers of the "state to make selections of land under the federal law, the state "is estopped by the action of such officers, in the absence of "fraud or collusion. The acts of the officers acting on behalf of "the state within the limits of the authority conferred upon "them and in the performance of their duties, are the acts of the "state and cannot be repudiated by it." *Herman on Estoppel, Vol. 2, §1228; also see on the same subject, Vol. 2, §76.*

The question of whether an estoppel is available against the state arose in *Commonwealth vs. Andre, 3 Pickering, 224.* It appeared that a committee of the legislature, duly authorized, granted by deed to Pierre Mathieu and his heirs and assigns, with warranty, a certain tract of land. Andre at the time was an alien subject of France. The purchase was made for the benefit of one Billon, also a subject of France. Upon the death of these persons intestate, the attorney general, pursuant to an act of the legislature, filed an information to recover the land, alleging that it ought to escheat to the commonwealth for defect

of title in any person who could, by law, hold it; but the court held the commonwealth estopped by its deed. *Bigelow on Estoppel, 246.*

"The deed of the commonwealth," said Chief Justice Parker, "to the very persons now defending as heirs of Andre, to "whom and to whose heirs the grant was made, is, we think, an "estoppel against setting up the alienage of these persons as a "ground of recovery." *Commonwealth vs. Andre, 3 Pick., 224.*

"No case has been cited from the supreme court in which "it has been directly held that the defense of estoppel can be "made against the national government, but in many cases it is "so assumed even where the term is not used." *United States vs. Williamette V. & C. M. R. Co., 44 Fed. Rep., 241.*

In the case of *Clarke vs. United States, 95 U. S., 543*, it was held that the defense to a claim against the government for the use of a steamboat, which involved bad faith on its part, could not be made. In *Branson vs. Worth, 17 Wall., 39*, it is assumed, in the opinion of the court, that the United States may be estopped. In the *United States vs. McLaughlin, 12 Sawyer, 200—30 Fed. Rep., 147*, it was said by Judge Sawyer, "that the law of estoppel, in a proper case, applies to the government." In *Indiana vs. Milk, 11 Fed. Rep., 389*, the court having found that the state, by its conduct, had recognized the validity of defendants' title, and thereby induced them to alter their position by investing their money in that title, Judge Gresham said: "The "state cannot now in fairness of law assert its invalidity. Reso-"lute good faith should characterize the conduct of states in their "dealings with individuals, and there is no reason in morals or in "law that will exempt them from the doctrine of estoppel."

Where the legislature, by a public resolve had declared that a certain monument was and was considered as the monument mentioned and intended in an ancient Indian deed under which a title was derived to certain proprietors, the commonwealth was estopped from afterwards showing that such monument was not

the one intended in such deed. *Commonwealth vs. Pipsent Proprietors, 10 Mass., 154.*

It is well settled that when the United States becomes a party to a suit in the courts, and voluntarily submits its rights to judicial determination, it is bound by the same principles that govern individuals. When the United States voluntarily appears in a court of justice, it at the same time voluntarily submits to the law, and places itself upon an equality with other litigants. *United States vs. Fossatt, 21 How., 450; The Floyd Acceptance, 7 Wall., 675; United States vs. Baker, 12 Wheat,, 559.*

The principles which govern inquiries as to the conduct of individuals in respect to their contracts are equally applicable where the United States are a party. *United States vs. Smith, 94 U. S., 217.*

In the case of *The Siren, 7 Wall., 159*, the court said:

"But, although direct suits cannot be maintained against the "United States, nor against their property, yet, when the United "States institute a suit, they waive their exemption so far as "to allow a presentation by the defendant of set-offs, legal and "equitable, to the extent of the demand made or property claim-"ed, and when they proceed *in rem*, they open to consideration all "claims and equities in regard to the property libeled."

And in the same case it was said that the government, by its appearance in court, "waives its exemptions and submits to "the application of the same principles by which justice is "administered between private suitors."

See, als , *Burbank vs. Fay, 65 N. Y., 62; Osborne vs. Bank of U. S, 9 Wheat., 870; U. S. vs. Macdaniel, 7 Pet., 1; Brent vs. Bank of Washington, 10 Pet., 615.* In the latter case the court declares that there is no reason why the United States should be exempted from a fundamental rule of equity subject to which its courts administer their remedy, and it is said: Thus compelled to come into equity for a remedy to enforce a legal right, the United States must come as other suitors, seeking, in the administration of the law of equity, relief, etc.

It follows, then, that when a state submits itself without reservation to the jurisdiction of a court in a particular case, that jurisdiction may be used to give full effect to what the state has by its acts of submission allowed to be done.

Admitting, then, that Owl Lake became the property of the state by reason of its sovereignty, was it not competent for the supreme court of Iowa, under the circumstances of this case, to say, as it did say, that it was not for the state to complain of the resurvey, and could not the case have been decided by the supreme court of Iowa without regard to the federal question involved?

III.

ARGUMENT ON THE MERITS.

If there is a federal question involved in this case and the right claimed by plaintiff in error as having its source in this federal question has been decided against it and the supreme court could not have decided the case on any question other than the federal question, then to what extent will this court enter into the merits of the case under the decisions of this court and notably under the decision in the case of Murdock vs. Mayor, etc. of Memphis, 20 Wall., 590, 642-3.

This court will inquire into the jurisdiction of the secretary of the interior to issue the patent of the land as swamp land to the state of Iowa, and beyond that it will not go.

If it finds in favor of that jurisdiction, it will affirm the judgment and that will end the case. If it finds against the jurisdiction, it will not find, as is contended by the plaintiff in error, "that the state of Iowa is the absolute owner of the land in question;" it will simply hold in harmony with the case of *Hardin vs. Jordan, 140 U. S., 371*, that the land, being the bed of a meandered non-navigable lake, is to be disposed of under the law of the state of Iowa, and it will remand the case back to the supreme court of Iowa for such final disposition.

In this case the plaintiff in error is the one who is seeking

affirmative relief and its suit is an assault, in a collateral proceeding, upon a patent of the United States, and it cannot succeed in such suit unless the patent is absolutely void, by reason of the fact that the secretary of the interior had no power, jurisdiction or authority to issue the same.

A.

In discussing this case on the merits with respect to the assignments of error, it becomes important to know just what the supreme court of Iowa did and did not decide. It did not decide that the beds of meandered lakes and streams do not belong to the state in trust for the public by virtue of its sovereignty and apart from any act of congress or grant from the United States. In the last analysis the only things it did decide were these: *First*, that there are cases where the secretary of the interior has the jurisdiction to re-investigate an original survey, and that the case at bar was one of such cases; and, *second*, that when such re-investigation has been made, it cannot be questioned in a collateral proceeding.

The assignments of error, when closely considered, narrow themselves down to the question of the correctness of the two findings above mentioned. In making said findings, said court did not deny, but it affirmed, that the duty of surveying the public domain and determining what lands belong to the general government under its deeds of cession or treaties and what are its arable lands and what are its swamp lands and what are the lands and waters that the state holds under its right of sovereignty, is committed to the department of the interior for determination. It did not deny, but it affirmed, that the decision of the department of the interior upon matters of fact within its jurisdiction, in the absence of fraud or imposition, is conclusive and binding upon the courts of the country, and it did not deny that the secretary of the interior had no jurisdiction, *as against a patentee in good faith under one survey*, to again patent the same land to another patentee under a second survey. It did not deny that the secretary of the interior would have no jurisdiction

to patent what never belonged to the United States or to patent what did belong to the United States, if it had been reserved from sale. And it did not deny the binding force of the decisions, cited by plaintiff in error, which hold that there is no jurisdiction to issue patents in *such cases*, lodged with the secretary of the interior. Such cases, however, are not this case. When Iowa was admitted into the Union certain of its territory belonged to the United States as a part of the public domain, and certain of its territory belonged to it as an attribute of its sovereignty. It became the duty of the secretary of the interior to dirempt or separate these parts one from the other; it was not his duty to give anything to the state of Iowa that did not belong to it, nor to sell anything to it. By his act the state did not become a purchaser for value to whom, by reason of such purchase, there would attach certain rights. He simply separated what belonged to the United States from that which belonged to the state of Iowa. Surely, as between these two parties, no other rights having attached, he could re-investigate and correct an erroneous survey. This is what the supreme court of Iowa decided, and this is all that it did decide, saving and excepting the further finding, which is in harmony with all the authorities, that his decision, if he had jurisdiction, cannot be assailed collaterally.

B.

In the case of *Steel vs. St. Louis Smelting and Refining Company, 106 U. S., 447*, this court says: "That department "(the interior department), as we have repeatedly said, was es- "tablished to supervise the various proceedings whereby a con- "veyance of the title from the United States to portions of the "public domain is obtained, and to see that the requirements of "the different acts of congress are fully complied with. Neces- "sarily, therefore, it must consider and pass upon the qualifica- "tions of the applicant, the acts he has to perform to secure the "title, *the nature of the land, and whether it is of the class open to* "*sale*. Its judgment upon these matters is that of a special tri-

"bunal, and is unassailable, *except by direct proceedings for its "annulment or limitation.*"

But a patent may not be collaterally impeached and its operation and conveyance defeated, except by showing that the department had *no jurisdiction* to dispose of the lands, that is, that the law did not provide for selling them or that they had been reserved from sale or dedicated to special purposes.

Wright vs. Rosebury, 121 U. S., 488.

The act of the secretary of the interior in identifying such lands is conclusive against collateral attack.

Ditto.

In the case of *French vs. Fyan, 96 U. S., 169,* the land department, having decided that a certain tract of land was swamp land, this court treated it as the determination of a special tribunal, which was binding in all actions brought to annul the patent. The land officers are charged with the duty of ascertaining whether the lands are subject to be patented or not, and their determination is conclusive. The character of the land is a thing which requires the exercise of judicial power and discretion upon the part of the officers of the land department, and their judgment thereon is not in a collateral proceeding open to review, where they have jurisdiction to act.

French vs. Fyan, 93 U. S., 169; Vance vs. Burbank, 101 U. S., 514; Smelting Company vs. Kemp, 104 U. S., 636; Quinby vs. Conlan, 104 U. S., 420; Gale vs. Best, 78 Cal., 235.

The question whether or not lands returned subject to periodical overflow are swamp and overflowed lands, is a question of fact properly determinable by the land department whose decision on matters of fact within its jurisdiction are, in the absence of fraud or imposition, conclusive and binding on the courts and not subject to review.

Heath vs. Wallace, 138 U. S., 573.

The land department is a tribunal appointed by congress to

decide certain questions relative to the public lands, and its decision upon matters of fact cognizable by it, in the absence of fraud or imposition, are conclusive everywhere else.

Johnson vs. Towsley, 13 Wall., 72; Warren vs. Van Brunt, 19 Wall., 946; Shepley vs. Cowan, 91 U. S., 330.

In the case of *Johnson vs. Drew, 171 U. S., 93*, this language is used: "The law in reference to this matter was summed up in the case of *Burfenning vs. Railway Company, 163 U. S., 321 and 323*, as follows: 'It has undoubtedly been affirmed over and over again, that in the administration of the public land system of the United States, questions of fact are for the consideration and judgment of the land department, and that its judgment thereon is final whether for instance a certain tract is swamp land or not, saline land or not, mineral land or not, presents a question of fact not resting on record, dependent on oral testimony; and it cannot be doubted that the decision of the land department one way or the other in reference to these questions is conclusive and not open to relitigation in the courts, except in those cases of fraud, etc., which permit any determination to be re-examined.'"

C.

Nearly, if not, all the authorities cited by plaintiff in error on the question of the jurisdiction of the secretary of the interior simply hold that a patent may be assailed in a collateral proceeding when it covers land that has already been conveyed by a prior patent, or when the land has already been disposed of by act of congress, or where it has been reserved from sale. We freely admit that in such cases jurisdiction is wanting in the secretary of the interior and there can be no question but that a patent issued under such circumstances can be collaterally assailed.

This, however, is not a case where the secretary of the interior has conveyed to an individual a 'lake bed" as such; it is not a case where the government has attempted in terms to convey to an individual the "tide waters" of the state; it is not a

case where the government has conveyed by patent to an individual a tract of land which, in terms, it had theretofore conveyed to another.

In such cases as the ones just mentioned it may be conceded that the land department would be without jurisdiction and that the patent would be void and could, therefore, be assailed in a collateral proceeding. But the case at bar is a case where the secretary of the interior purports, in terms, to convey swamp lands to the state as such, and he has the right under the law to convey swamp lands; he is clothed with this power, and by statute it is made his duty.

In this case he determined that the original plat made by the United States surveyor was wrong and that the land beyond the meander lines was not lake bed but swamp land. In the absence of some equity claimed by a *bona fide* purchaser or some equity claimed by a riparian owner, he had jurisdiction to determine that the original survey and plat were wrong.

D.

When the treaty was made with France in 1803, whereby there was transferred to the United States the territory now contained within the limits of the state of Iowa, there were, as has been said, in said territory the beds of lakes and rivers, the title to which the United States, we may admit, received and held in trust for the future state and which, when the state came into existence, attached to it as an attribute of its sovereignty, and there were the lands which became the property of the United States as a part of the public domain.

On the making of the treaty these two classes of lands were not segregated one from the other. Iowa was admitted into the Union in 1846, yet even at that time the two classes of lands which were in the vicinity of Owl Lake were still unsegregated one from the other. The officers of said state did not then know what lands did or did not attach to it by virtue of its sovereignty. How was the matter to be determined? Where was the jurisdic-

tion to determine it? Was it in the new sovereignty, the state, or was it in the land department of the general government? The plaintiff in error admits that this jurisdiction was originally in the land department of the general government, for in argument it says in substance, that when the original United States survey was made, the meander lines run, the survey approved and the adjoining lands sold, the character of the lands in controversy as lake bed thereby became irrevocably fixed.

In this proposition is summed up the whole claim and case of plaintiff in error, and the whole question is aptly stated by the supreme court of Iowa, in this case,—*109 Iowa, 13*—as follows: "The whole case, in our judgment, turns upon the effect "to be given the original survey. If that is conclusive, it amounts "to a segragation of the lakes and river beds from the public do- "main, and, as a general rule, confirms the title thereto in the "state. If the survey is not conclusive, but is simply adminis- "trative or advisory, then the land department has the right at "some future day to determine its character and cause a patent to "issue accordingly, and when this is done the finding is not sub- "ject to collateral attack."

In the case of *Grant et al. vs. Hemphill et al., 92 Iowa, 218*, it was proved that the land in controversy in that case, which the government survey and plat showed was lake bed and which was beyond the meander lines, was in fact high, dry ground, and that there was no shore line at all, and the supreme court of Iowa found and held that the supposed lake bed was not lake bed at all, but a part of the public domain. In the case of *Bigelow vs. Hoover, 85 Iowa, 161*, the question arose as to the ownership of a certain island in a meandered lake. The island had become by accretion attached to the adjoining land. The original government survey showed no island, but it showed a place occupied by the island as a "bayou." If, as a matter of fact, no island existed at the time of the government survey, then the island was the property of the plaintiff in said action by the law of accretion. If at that time it did exist as an island, it was not the property

of the plaintiff. The supreme court of Iowa found in opposition to the government survey that the so-called lake was at the time of the government survey in part an island, and as such was the property of the general government and a part of the public domain.

In passing upon the question said court says, *85 Iowa, page 183*, "We conclude that notwithstanding what appears in the "government plat, the island did exist at the time of the survey "as a separate and distinct body of land from the plaintiff's lots, "and the plaintiff is not, therefore, entitled to the whole of the "island as accretion to his land."

In the case of *Glenn et al. vs. Jeffry, 75 Iowa, 20*, the government survey and plat showed that the meander lines were along the banks of the Missouri river and that whatever was beyond these lines was in the bed of the river. The supreme court of Iowa found contrary to the original government survey that the meander lines were along a bayou and that between this bayou and the river was an unsurveyed portion of the government domain.

Our contention in this case can be stated in two propositions:

First. Originally the land department of the United States had jurisdiction to segregate the public domain from the beds of lakes and streams, the title to which beds and streams attach to the state as an attribute of its sovereignty.

Second. The secretary of the interior has ample power to set aside a survey of public lands, though the same has been confirmed by the commissioner of the general land office, and though an appeal has not been taken from his findings; and the action of the secretary of the interior in this respect is unassailable in a collateral proceeding where rights of *bona fide* purchasers for value do not interfere. Under this contention, even though a survey has been made, the lines meandered, and the land beyond the meander lines has been on the pl t marked "lake," and even though the survey has been approved by the commissioner of the

general land office and no appeal has been taken from his finding, it is still competent for the secretary of the interior, the rights of *bona fide* purchasers for value not having intervened, to set aside such survey and to order a new survey and to determine that the land beyond the meander lines is not correctly described by the original survey and plat; and he can do this either on evidence furnished to him as was done in this case, or he can do it on his own motion or for any other reason which satisfies him that the first survey was incorrect; and he is clothed with this power under the law.

This whole question, it seems to me, has been settled by this court in the case of *Knight vs. United States Land Association, 142 U. S., 161.* In that case one Stratton had made a survey which was approved by the surveyor general of the state of California, and confirmed by the commissioner of the general land office. This survey, like the one in the case at bar, did not include the lands afterwards in controversy, said lands being beyond the meander lines, and claimed to be below high tide, and as such the property of the state, pertaining to its sovereignty as such. No appeal was taken from the action of the commissioner of the general land office approving the Stratton survey.

In making this survey Stratton ran its lines along the line of ordinary high-water mark of the bay of San Francisco until he came to Mission creek, a small stream or estuary of the bay, and then followed the tide line up the creek, and crossing over, ran down on the other side. This plan seems also to have been followed with reference to a few other small estuaries. The city protested against this method of survey, and, through her attorney of record, gave notice of appeal from the action of the commissioner of the general land office to the secretary of the interior, claiming that the proper method of running the line along the bay was to follow the tide line of the main body of water and cut across the mouths of all estuaries or creeks which are arms of the bay. The board of supervisors of the city, however, decided not to appeal from the decision of the commis-

sioner of the general land office confirming the Stratton survey, and, declaring that the action of the attorney was unauthorized, discharged him. Thereafter the board passed a resolution, addressed to the secretary of the interior, in which it was stated that, in its opinion, the Stratton survey was entirely correct and legal, and should be approved.

Notwithstanding this action of the board, the secretary of the interior sent for the papers in the case, and, upon an elaborate examination of the points involved, reversed the action of the commissioner of the general land office approving the survey, thus substantially sustaining the original protest of the city to the running of the boundary line of the grant up the estuaries of the bay.

Upon motion for review, a subsequent secretary of the interior sustained the action of his predecessor, and ordered a survey made in conformity with the views of the department. *2 Land Dec., 346.* It was under those instructions that the Von Leicht survey was made, upon which the patent was issued. Subsequently an application was made to a succeeding secretary to have the patent recalled and cancelled, and a new patent issued but it was denied, the secretary holding that he had no power under the law to grant the application, and that, even if he had, he should decline to exercise it, because he considered the views of his predecessors sound and correct. *5 Land Dec., 483.*

The plaintiff, the United States Land Association, claimed the land from the state of California and that the title of the state to the land attached to it as a part of its sovereignty. The defendant claimed the title to the land through a patent issued by the United States' land department, based on a survey known as the Von Leicht survey, made long after the original Stratton survey. After the parties had introduced their evidence of title, the referee to whom the case had been referred found as follows:

"(1) The state of California upon her admission into the "Union, September 9, 1850, became seized in fee of the premises ' in dispute;

"(2) This title subsequently became vested in the plaintiffs "by virtue of certain conveyances described;

"(3) This title of the plaintiffs was subject to defeat by the "decree of the circuit court confirming the claim of the pueblo, "but the premises being without the confirmed survey of 1873, "and outside the specific boundary given in the decree, remained "the property of the state;

"(4) The second (Von Leicht) survey was illegal because it "was not approved by the surveyor general of California, no ap- "peal was taken to the secretary of the interior from the decision "of the commissioner of the general land office approving the "prior survey; and because the second survey was not retained "in the office of the United States surveyor general for ninety "days, and no notice of the same was given to enable parties in "interest to file protests, as required by law; and because, in ap- "proving said prior survey, said commissioner of the general land "office was acting in a judicial capacity and his judgment there- "on is not reversible and was not legally reversed; and

"(5) The description of the premises contained in the pat- "ent being in excess of the premises described in the prior survey "and in the decree, the patent, to the extent that it covered land "of the state not confirmed to the claimant, was invalid and did "not operate to convey the state's title to the premises in contro- "versy."

The judgment of the supreme court of the state was based substantially on the same grounds as that of the referee. The correctness of the propositions of law involved were drawn in question by writ of error bringing the proceedings before this court. In passing upon the question, Justice Lamar uses the following language:

"The case as presented by this record involves some very "interesting questions. Ever since the decision of *Polk's Lessee "vs. Wendall, 9 Cranch, 87*, it has been the settled law of this "court that a patent is void at law if the grantor state had no "title to the premises embraced in it, or if the officer who issued

"the patent had no authority so to do, and that the want of such "title or authority can be shown in an action at law. *Patterson "vs. Winn, 11 Wheat., 380, 384; Stoddard vs. Chambers, 2 How., "284, 318; Easton vs. Salisbury, 21 How., 426; Reichart vs. "Felps, 6 Wall., 160; Best vs. Polk, 18 Wall., 112; Smelting Co. "vs. Kemp, 104 U. S., 636; Steel vs. Smelting Co., 106 U. S., "447, 453; Wright vs. Roseberry, 121 U. S., 488, 519; Doolan "vs. Carr, 125 U. S., 618, 625, and authorities there cited.*

"It is sought by the plaintiffs to bring this case within that "rule; and it is, therefore, strenuously insisted that the patent for "the San Francisco pueblo is void to the extent that it embraces "lands below ordinary high water mark of Mission Creek, as that "line existed at the date of the conquest from Mexico in 1846. "In order to sustain this proposition the claim is put forth that "the Stratton survey was correct, and was never legally set aside; "that the Von Leicht survey, upon which the patent was issued, "was wholly unauthorized in law and void; and that the prem- "ises in dispute being excluded by the Stratton survey, and being "proved by parol evidence to have been below the line of ordin- "ary high-water mark, were never legally included in the patent, "and were not included in the decree of confirmation.

"It is a well settled rule of law that the power to make and "correct surveys of the public lands belongs exclusively to the "political department of the government, and that the action of "that department, within the scope of its authority, is unassail- "able in the courts except by a direct proceeding. *Cragin vs. "Powell, 128 U. S., 691, 699, and cases cited.* Under this rule it "must be held that the action of the land department in determining "that the Von Leicht survey correctly delineated the boundaries "of the pueblo grant, as established by the confirmatory decree, "is binding in this court, *if the department had jurisdiction and "power to order that survey.* It is claimed, however, and the ref- "eree so determined, that no such power or authority existed in "the department, because it had been exhausted by the action of "the commissioner of the general land office in approving and

"confirming the Stratton survey in 1878. This contention is "based upon the proposition that the secretary of the interior had "no authority to set aside the order of the commissioner approv- "ing and confirming the Stratton survey, especially in view of "the fact that no appeal was taken from such order and the au- "thorities of the city acquiesced in that survey. This proposition "is unsound. If followed as a rule of law, the secretary of the "interior is shorn of that supervisory power over the public "lands which is vested in him by section 441 of the Revised "Statutes. That section provides as follows: 'The secretary of "the interior is charged with the supervision of public business "relating to the following subjects: * * * * * Second, "The public lands, including mines.' Section 453 provides: 'The "commissioner of the general land office shall perform, *under the* "*direction of the secretary of the interior*, all executive duties ap- "pertaining to the surveying and sale of the public lands of the "United States or in any wise respecting such public lands, and "also such as relate to private claims of land, and the issuing of "patents for all (*agents*) (grants) of land under the authority of "the government.' Sec. 2478 provides: 'The commissioner of "the general land office, *under the direction of the secretary of the* "*interior*, is authorized to enforce and carry into execution, by "appropriate regulations, every part of the provisions of this title "(the public lands) not otherwise specially provided for.'

"The phrase, 'under the direction of the secretary of the "interior,' as used in these sections of the statutes, is not mean- "ingless, but was intended as an expression in general terms of "the power of the secretary to supervise and control the extens- "ive operations of the land department of which he is the head. "It means that, in the important matters relating to the sale and "disposition of the public domain, the surveying of private land "claims and the issuing of patents thereon, and the *administra-* "*tion of the trusts devolving upon the government, by reason of the* "*laws of congress or under treaty stipulations, respecting the public* "*domain, the secretary of the interior is the supervising agent of*

"*the government* to do justice to all claimants and preserve the "rights of the people of the United States. As was said by the "secretary of the interior on the application for the recall and "cancellation of the patent in this pueblo case (*5 Land Dec., 494*): "'The statutes in placing the whole business of the department "under the supervision of the secretary, invest him with authority "to review, reverse, amend, annul or affirm all proceedings in the "department having for their ultimate object to secure the alien- "ation of any portion of the public lands, or the adjustment of "private claims to lands, with a just regard to the rights of the "public and of private parties. Such supervision may be exer- "cised by direct orders or by review on appeals. The mode in "which the supervision shall be exercised in the absence of stat- "utory direction may be prescribed by such rules and regulations "as the secretary may adopt. When proceedings affecting titles "to lands are before the department the power of supervision may "be exercised by the secretary, whether these proceedings are "called to his attention by formal notice or by appeal. It is "sufficient that they are brought to his notice. The rules pre- "scribed are designed to facilitate the department in the despatch "of business, not to defeat the supervision of the secretary. For "example, if, when a patent is about to issue the secretary should "discover a fatal defect in the proceedings, or that by reason of "some newly ascertained fact the patent, if issued, would have to "be annulled, and that it would be his duty to ask the attorney "general to institute proceedings for its annullment, it would "hardly be seriously contended that the secretary might not in- "terfere and prevent the execution of the patent. He could not "be obliged to sit quietly and allow a proceeding to be consum- "mated, which it would be immediately his duty to ask the "attorney general to take measures to annul. It would be a "sufficient answer against the exercise of his power that no appeal "had been taken to him, and therefore he was without authority "in the matter."

"There is authority in this court for this holding. *Magwire*

"*vs. Tyler, 1 Black, 195,* was a case involving the right of the "commissioner of the general land office, under the act of July 4, "1836, 5 Stat. 107, c. 352, reorganizing that bureau, and of the "secretary of the interior, under the act of March 3, 1849, Stat. "395, establishing that department, to take jurisdiction of sur- "veys made in the upper Louisiana country upon confirmed "Spanish titles. One of the questions presented was whether the "secretary of the interior could reject such a survey and order a "new one of the same claim, and issue a patent upon the second "survey. By the act of March 3, 1807, the board of commis- "sioners appointed to pass upon the merits of such claims was re- "quired to deliver to each party whose claim was confirmed, a "certificate that he was entitled to a patent for the tract of land "designated. This certificate was to be presented to the survey- "or general, who proceeded to have the survey made and re "turned, with the certificate, to the recorder of land titles, whose "duty it was to issue a patent certificate, which, being transmit- "ted to the secretary of the treasury, (then the head of the land "department) entitled the party to a patent. By the act of April "25, 1812, the duty of the secretary of the treasury was trans- "ferred to the commissioner of the general land office. The act "of April 18, 1814, required that accurate surveys should be "made, according to the description in the certificate of confir- "mation, and that proper returns should be made to the commis- "sioner, of the certificate and survey, and of all such other evi- "dence as the commissioner might require. The court said: "'These acts show that the surveys and proceedings must be, in "regard to their correctness, within the jurisdictions of the com- "missioner; and such has been the practice. Of necessity he must "have power to adjudge the question of accuracy preliminary to "the issue of a patent.'"

* * * * * * *

"In the language of this court in the late case of *Williams* "*vs. United States, 138 U. S., 514, 524:* 'It is obvious, it is com- "mon knowledge, that in the administration of such large and

"varied interests as are entrusted to the land department, matters "not foreseen, equities not anticipated, and which are, therefore, "not provided for by express statute, may sometimes arise, and "therefore, that the secretary of the interior is given that super-"intending and supervising power which will enable him, in the "face of these unexpected contingencies, to do justice.' See also "*Lee vs. Johnson 116 U. S., 48.*"

* * * * * * *

"The same remarks apply to the powers of the secretary of the "interior, under a similarly worded section of the Revised Statue "(§463), to supervise and control the management of the bureau "of Indian affairs, which powers, so far as we are advised, have "never been questioned."

"But if there was any doubt of the existence of such power "in the secretary of the interior, as an original proposition, still "the exercise of it for so long a period—going back to the organ-"ization of that department—without question, ought to be con-"sidered as conclusive as to the existence of the power. *Hastings "& Dakota Railroad, vs. Whitney, 132, U. S., 357* and authorities there cited."

"We conclude, on this branch of the case, that the secretary "of the interior had ample power to set aside the Stratton survey "and order a new survey by Von Leicht; and *that his action in "such matter is unassailable in the courts in a collateral proceed-"ing.* The Von Leicht survey, therefore, must be held as a cor-"rect survey of the pueblo claim as confirmed by the circuit "court. Moreover, the method of running the shore line of the "bay of San Francisco, adopted by the Von Leicht survey, was "approved b the circuit court itself in *Tripp vs. Spring, 5 Saw-"yer, 209;* and on this point we entertain no doubt."

In the case of *Stoneroad vs. Stoneroad, 158 U. S., 240,* this court says: "The practice of the United States in dealing with "the public domain and all governmental grants of land is to "survey and issue patent. For this purpose in the proper ad-"ministrative branch of the government accurate and efficient

"machinery, accompanied with full remedial process for the cor-
"rection of error is provided."

In the case of *Michigan Land & Lumber Company (Limited) vs. Rust, 168 U. S., 593*, this language is used: "In *Tubbs vs. Wilhoit, 138 U. S., 134 and 143*, the court quoted with approval this passage from a letter of the secretary of the interior: 'There can be no doubt but that under the act of July 4, 1836, reorganizing the general land office, the commissioner has general supervision over all surveys and that authority is exercised whenever error or fraud is alleged on the part of the surveyor general.' And in *New Orleans vs. Paine, 147 U. S., 261*, the question was presented as to the power of the department to order a new survey, and on page 266, 147 U. S. and page 306, the rule was thus stated: 'If the department was not satisfied with this survey, there was no rule of law standing in the way of its ordering another. Until the matter is closed by final action, the proceedings of an officer of a department are as much open to review or reversal by himself or his successor as are any interlocutory decrees of a court open to review upon final hearing.' So, notwithstanding that a survey had been made, and that such survey indicated that the land in controversy was swamp land, and therefore passing, under the act of 1850, to the state of Michigan, it was within the power of the land department, at any time prior to the issuing of a patent, of its own motion, to order a resurvey and correct by that any mistakes in the prior survey."

E

The case of *Knight vs. United States Land Association* is authority for two propositions: *First*, the secretary of the interior had jurisdiction in the case at bar to do what he did do, that is, to issue the patent, and, *second*, that because he had jurisdiction, the legality of the patent cannot be questioned.

The case of *Railway Company vs. Butler, 159 U. S., 687*, cited by plaintiff in error and which seems to hold contrary to the doctrine above enunciated, was decided agreeably to the law of Michigan, under which law the title of the riparian owner

extends to the thread of the stream, and therefore such title covered an island between the water line of the riparian owner's land and the thread of the stream; but this law is directly contrary to the holding in the Iowa case of *Bigelow vs. Hoover*, cited *supra*. In the *Hoover* case the Michigan court would have decided that the island therein referred to belonged to the riparian owner. The Iowa court decided that it was a part of the public domain. In the said case of *Railway Company vs. Butler*, it was because the first patent covered and conveyed the island that the second patent was held to be a nullity, and, therefore, such second patent could have been assailed in a collateral proceeding. If it had been held in that case, as the Iowa supreme court held in the *Hoover* case, that the first patent did not cover the land, the second patent would have covered it, and it would have been good as against collateral assault.

F.

Under the facts in the *Hemphill* case cited *supra*, would it not have been competent under the authority of *Knight vs. United States Land Association*, for the secretary of the interior to have made a re-examination of the land originally surveyed and to have found that the so called lake bed was not such in fact, but high, dry ground, and as such, a part of the public domain? And might he not, after such finding, have disposed of it as such? And under the facts stated in the *Bigelow* and *Glenn* cases, might he not have made a like re-examination and a like finding, and on such finding, might he not have disposed of the land as a part of the public domain?

If it is possible for the original survey by mistake to show as lake bed that which is in fact high dry ground, or which is in fact an island, or to show that as river bottom which is in fact a part of the public domain, it is also possible for it by mistake to show that as a lake bottom which is in fact swamp land. The question is one of degree affecting the *quantum* of proof but not affecting the jurisdiction of the secretary of the interior. If the

secretary of the interior has the jurisdiction to find that the lake bottom, as shown by the original survey, was in fact an island or was dry upland, he has *mutatis mutandis* the jurisdiction to find that it was swamp land.

G.

The ordering and making of a survey is only an incident in the sale of public land. If the secretary of the interior has the power and authority to set aside a survey and order a new one, to the end that he may dispose of the public domain, he has the power to dispense with the second survey when the facts and circumstances are such as not to require a new survey. Doubtless in nearly all cases a new survey would be needed before conveyances could be made, in order to make the description of the land sufficiently definite and in order to determine the number of acres to be conveyed.

In this case (see transcript, page 61), the land in controversy is all in one body, being portions of sections 21, 22, 27, and 28, which said sections are in the interior of a congressional township. These sections all meet in a corner common to all. The land at their common corner is the land in controversy. An elongation or extension of the section lines which are common to sections 21 and 22, common to sections 22 and 27, common to sections 27 and 28, and common to sections 28 and 21, completes the description and determines the exact quantity of the land in each subdivision. The mistake made by the original surveyor was not in the section lines, but in the location of meander lines and in determining the character of the land beyond the meander lines. The lack of a new survey in such case is not vital and it does not affect the jurisdiction of the secretary of the interior.

H.

The second assignment of error reads thus: *The court erred in holding that the survey of the public lands of the United States, the approval of such survey by the land commissioner of the United States and the secretary of interior, and the sale of the land under*

such survey, did not fix the status of the meandered lakes and streams, except in cases of palpable mistake or fraud, beyond recall by any subsequent act of the land department. It is in its use of the words "palpable mistake" conveniently obscure. The evidence which to one secretary would show that the mistake was palpable might to another barely show that there was a mistake. Shall it be said that in such case the same state of facts would give jurisdiction to one secretary and deny it to the other?

That there was a mistake in the original survey of Owl Lake we have always contended. The allegations of our petition as to the condition of the land—*trans. page 3*—are as follows:

"That on September 28, 1850, when the said swamp land "act referred to in paragraph 1 hereof became a law, the said "lands described in paragraph 7 hereof were in fact swamp and "overflowed lands within the meaning of said act of congress, "and said land was at that time and continuously until said "Pearsons received the title to the said land, as set out in para- "graph 6 hereof, entirely unfit for cultivation without artificial "drainage by reason of the same being wet, swampy and marshy, "and largely grown up to rank grass, reeds and rushes and over- "flowed with water."

It could have availed us nothing to have alleged the bald fact that the description of the land as a lake in the original survey was a mistake and a misnomer. For the purpose of showing the swampy character of the land and the evidence on which the secretary of the interior acted when he issued the patent, I quote from transcript, page 50, as follows:

"JOHN JOHNSON on behalf of the plaintiffs testified:

"I have lived in Humboldt county forty years last spring. I "saw Owl Lake first in August, 1856. I had heard there was a "lake and went over to see it. I struck the lake a little north- "west of the south timber, and after I got as near as I could to "it—it was all grown up in rushes, grass, and weeds and every- "thing—we didn't think there was much of a lake, but we could

"see a little clear water to the southeast corner. We went around "the southeast corner and there was a strip of clear water, it "might have been thirty or forty rods from the north to the east "shore, and it might have run sixty or eighty rods west, but it "grew narrower to the west. There might have been ten or fif- "teen acres there perhaps; in part of this wild lilies grew; it was "quite low at the time I saw it; there was clear water only in "places and that was along the southeast where there was a little "beach or sand bar. Fifteen or twenty rods from the shore, the "pond lilies grew up. I do not think that there were over eight "or ten acres where there was nothing growing. I saw the lake "again in 1875 and there was not much difference; might have "been a little more water than when I first saw it. On the south- "east corner it was perhaps three or four rods down to the water's "edge."

OLE H. KORSLUND (trans. 20) says: "For twenty years I "have known what is generally termed Owl Lake; but during "the years I have known it, it has been in general character "quite similar to the swamp land known as impassable marsh to "the south and southwest thereof; that during said time there "had grown up in said so-called Owl Lake long grass, reeds, "weeds, rushes, etc., and the same has been swamp land, and as "above stated of the same general character as the swamp land to "the south and west thereof, which has been patented to the state "as swamp land. And I further depose and say that since I "have known the so-called lake, the same has at times been dry "in part, and this was true before said lake was ditched or drained."

Substantially like the testimony of Korslund and Johnson was the testimony of Willixsen, Halgrims (trans 20) French, Jones (trans. 23 and 24) A. J. Johnson, McCauley, Winne, Foster, Bartholomew (trans. 25, 26, 27) Hartwell, Thompson, Lund, Cox (trans. 46, 47 and 48) Shellenberger (trans. 53) and others.

On such evidence as the above the secretary of the interior acted and patented the land to the state of Iowa as swamp land.

When he patented this land it becomes important to ask,

Were there any interfering rights of third parties that would render the act of the secretary of the interior void?

I.

The case of *Hardin vs. Jordan, 140 U. S., 371*, holds that the title to the land between the shore line and the middle of a non-navigable, meandered lake is to be determined by the law of the state where the lake is situated; thus under the law of Michigan a riparian owner owns the bed of the lake to the center line. Under the laws of Iowa and Minnesota the title to the bed of navigable lakes is in the state, but under the law of Minnesota, the title to the bed of a non-navigable, meandered lake is in the riparian owner to the center of the lake, but under the law of Iowa the title to no part of the bed of a meandered, non-navigable lake is in the riparian owner. *Noyes vs. Collins, 92 Iowa, 566; McMannis vs. Carmichael, 3 Iowa, 1.* In this case, then, the ownership of no third party intervened when the secretary patented the land and the riparian owners did not then complain and do not now complain with respect to any riparian rights. The whole controversy was between the land department of the United States and the plaintiff and defendants in error herein. When the secretary of the interior assumed to take jurisdiction and to determine the swampy character of the land in question, the state of Iowa did not, as has been said, occupy the position of a *bona fide* purchaser who on the strength of the original survey and the recording of the plat had invested its money or altered its position. The state was simply in the same position that it was in in the year 1846 before the original survey was made. It had done nothing and given nothing that could stand in the way of correcting the original erroneous survey.

J.

Section 2 of the act entitled "An act to enable the State of Arkansas and other states to reclaim the swamp lands within their limits," approved September 28, 1850—United States Statutes at large, Volume 9, page 520—provides "that it shall be "the duty of the secretary of the interior so soon as it may be

"practicable after the passage of this act to make out accurate "lists and plats of said lands described as aforesaid and transmit "the same to the governor of the state * * * * and at the "request of the said governor cause patents to be issued to the "state therefor and on that patent the fee simple to said lands "shall vest in the state, subject to the legislature thereof."

By Section 3 of an act entitled "An act providing for the "collection of money due the state of Iowa from the government "of the United States, arising from the disposition of the swamp "lands and for selecting the swamp lands and securing the title "to the same," passed January 25, 1855, and being chapter 138 of the Laws of the Fifth General Assembly of the state of Iowa, it is provided: "That the governor is hereby authorized to "adopt such means as to him may seem expedient to provide for "the selection of the swamp lands of this state and to secure to "the state the title to the same."

Under the provision of the first of these acts the secretary of the interior is made a tribunal to determine the character of the lands claimed as swamp land under that act, and the governor of the state is designated as the authorized agent or official of of the state to demand and receive a patent from the government of the United States for the lands that are found to be swamp. In addition to the authority of the government conferred by act of congress, the act of the general assembly of the state of Iowa invested the governor with authority to adopt such means as to him might seem expedient to provide for the selection of the swamp lands of the state of Iowa and to secure to the state the title to the same.

In the case at bar the application to the department of the interior was made by the state, through its governor with the contention that the lands were in fact swamp lands and that the state claimed them as such under the act of 1850, and with the application the governor submitted proofs with respect to the character of the lands. On this application and on these proofs, a hearing was had before the department, and it was determined

that the lands inured to the state under the act of congress of September 28, 1850, and in conformity with this determination a patent was issued to the state. The state being entitled to these lands through one of two sources and having, through the authority appointed by law, asserted its right under the act of congress of 1850 before the proper tribunal and having, through the determination of that tribunal, acquired title to the land, cannot now, it seems to me, disregard that determination and assert title through other sources.

If these lands were not in fact swamp lands within the meaning of the swamp land act, the act of the department of the interior in selecting and patenting them to the state as swamp land, was erroneous; but the question of these lands, was a question of which the department of the interior had jurisdiction, and in the case made before that department, the governor, who by law was the authorized representative of the state, caused the question to be taken up and determined, and on his request the patent issued. This determination of the department of the interior has the force of an adjudication until changed or reversed by competent authority in a direct proceeding and the principle here stated is in harmony with the law as declared by this court in the case of *Rogers Locomotive Works vs. American Emigrant Company, 164 U. S., 569.*

As is well said by the supreme court of Iowa, *Reed vs. Wallace, 109 Iowa, 13*, "Whenever question arose as to the character "of land such as that in dispute, it was certainly competent for "the governor to submit the matter to the only authority that "had original jurisdiction in the matter."

It seems to me that it needs no further discussion nor citation of authorities to show that these legislative acts, both state and national, invested the governor of the state of Iowa with a general authority to secure to the state the title to its swamp lands, even though his act in so doing might draw in question another title through which the state might have claimed the land, and that he was not, when making the application to the

secretary of the interior, an intermeddler or an agent acting beyond the scope of his agency, but that he was the agent or representative of the state in the very matter in which he sought to act, having been clothed with the authority so to act by the legislature of the state, and that when appearing before the department of the interior, he truly represented the state—the only party in interest, except the defendants in error, and that when the decision was rendered the state was bound thereby.

In the proceedings before the secretary of the interior it was open to the state of Iowa to file counter affidavits or to submit other proof tending to show that the land was in fact not swamp land but lake bottom. It has been open to the state of Iowa to assail the finding of the secretary of the interior in a direct proceeding and to litigate the case on its merits. It has not done so, but has seen fit to institute this collateral proceeding, and it seems to me it cannot now prevail.

Respectfully submitted.

R. M. WRIGHT,

Of Counsel for Defendants in Error.